Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-898

ADRIAN WILSON,

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Adrian Wilson, Defendant in Action 75-1314, petitions for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Ninth Circuit, affirming a conviction in the United States District Court in Nevada on one count of violating the Travel Act (18 USC § 1952) and one count of conspiring to violate the Travel Act by utilizing the facilities of Interstate Commerce in order to bribe an officer to obtain favorable zoning in violation of 18 USC § 371, the Federal Conspiracy Statute.

OPINIONS BELOW

The Opinion of the Court of Appeals has not yet been reported, but is attached hereto in the Appendix infra pp. A1-20.

CONCISE STATEMENT OF GROUNDS

The Petition is grounded upon the failure of the Court to give requested entrapment instructions; upon the lack of jurisdiction of the District Court to try this case under the provisions of the Travel Act, the criminal activities complained of being local in nature and within the knowledge of Government prosecutors for the State of Nevada, who had prosecuted one defendant and refused to prosecute two other defendants; and upon the admission into the record of a transcript of a wire tap, which was received by the Government as a result of illegal activities on its part.

With respect to the issue of entrapment, the Defendant Wilson was an unwary innocent and not predisposed to commit the offenses with which he was charged. The crimes with which he was charged were the direct product of the activities of the Nevada State Officials, who forced his real estate agent, by use of third degree tactics and outright lies, to make offers of bribes to the Board of Commissioners of Clark County, Nevada, and secretly removed the Attorney whom Wilson had retained to obtain the zoning changes for which the asserted bribery occurred. The same officials caused that Attorney to conceal from Wilson that he had terminated his employment because of activities of the State of Nevada which the attorney thought involved Wilson's real estate agent, and that he had advised a Defendant Commissioner to accept moneys from Wilson's real estate agent. Furthermore, the activities of the State of Nevada were so outrageous and constituted such a participation in the alleged criminal activities as to violate both fundamental due process principles and to require the imposition by

this Court of a bar upon the utilization of the Federal Judicial System for prosecution of the alleged violations. In any event, based upon the facts of this case, there was sufficient evidence to show the creative activity of the Government in the crime, and a genuine issue existed as to predisposition of Wilson to commit the crimes with which he was charged. Therefore the failure of the District Court to require that the jury be instructed on entrapment in the subjective sense, even though the proferred instructions did not conform exactly to the language of Devitt and Blackmar, Federal Jury Practice & Instructions (2d Ed. 1970), constitutes reversible error.

In proceeding with the prosecution, solely because the Nevada Attorney General was unsuccessful in having the County Grand Jury return an indictment against the Defendant Ryan, and failed to cause the Magistrate to bind the Defendant over and, or, to have the Clark County District Attorney timely prosecute, while the local officials could have prosecuted Wilson, a local matter was turned into a Federal matter, in violation of the rules set forth in *Rewis v. United States,* (1971) 401 U.S. 808; *United States v. Archer* (2d Cir. 1973) 486 F.2d 670; *United States v. Isaacs* (7th Cir. 1974) 493 F.2d 1124; *United States v. Altobella* (7th Cir. 1971) 442 F.2d 310.

Certain transcripts used at the trial were obtained through the use of illegal interceptions, which violated the restraints laid down by *Berger v. State of New York,* (1967) 388 U.S. 41, and the evidence does not support the conclusion of the Reviewing Court that the leads were obtained after May 19, 1972, the date on which Wilson's Real Estate Agent became an Agent of the State.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit (Appendix infra pp. A1-20) was entered on the 24th day of May, 1976. Petition for rehearing was denied

on November 29, 1976 and an Order staying issuance of the mandate was issued by the Court of Appeals pending the filing, consideration and disposition of a Petition for Writ of Certiorari, providing such Petition is filed with the Supreme Court of the United States on or before December 29, 1976. The jurisdiction of this Court is invoked under the provisions of 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Whether the activities of the Nevada law enforcement officials constituted creative activity which entrapped an unwary innocent?

2. Whether, under the circumstances of this case, the conduct of the Nevada Law Enforcement Agents was so outrageous that, assuming arguendo, there was a crime committed under the Travel Act, there, nevertheless, exists a defense against conviction because of, either due process principles, or because of the inherent supervisory power of this Court over the processes which may be utilized by Governmental Agents in order to obtain a conviction?

3. Whether an entrapment instruction should have been given by the District Court, if not in the form presented by the Defendant Wilson, at least in a form which would have required the jury to determine whether the Defendant Wilson was a person otherwise innocent, whom the Government was seeking to punish for an alleged offense, which was the product of the creative activity of the Nevada Officials?

4. Whether, under the facts of this case, there existed a violation of the Travel Act?

5. Whether tapes of conversations between the Defendant Wilson and other Defendants were obtained illegally in that the cooperation of Wilson's Agent was obtained by coercion and force?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution:

Fourth Amendment, Fifth Amendment, and Section 1 of the Fourteenth Amendments

Statutes:

18 USCA § 371
18 USCA § 1952
18 USCA § 2510-2520

Federal Rules of Criminal Procedure:

18 USCA Rule 30
18 USCA Rule 51
18 USCA Rule 52(b)

Federal Rules of Civil Procedure:

28 USCA Rule 51
28 USCA Rule 46

Nevada Revised Statutes:

N.R.S. 197.020 and 197.030

Appendix "B" contains the statutes involved and the Federal Rules discussed.

STATEMENT OF THE CASE

After a jury trial with Codefendants James G. Ryan and Bernard Zeldin, involving Miro Mike Mi-era, an unindicted co-conspirator, the Petitioner Wilson was convicted of having conspired to violate, and violating the provisions of the Travel Act (18 USC § 371 and 18 USC § 1952). He was sentenced to 90 days' imprisonment and a fine of $10,000 as to the first count, and 90 days' imprisonment and $10,000 fine as to the second count. Clerk's Record "C.R." 964. Imprisonment to run concurrently with imprisonment on count one. The Defendant Ryan was convicted and sentenced to a term of imprisonment of

5 years on the conspiracy count, and a concurrent 5 year term on the substantive count, while the Defendant Zeldin was sentenced to a year and a day imprisonment on count one and a term of a year and a day imprisonment and a $5,000 fine on count two.[1] Imprisonment to run concurrently with imprisonment on count one. Wilson currently is released on his own recognizance (CR 968). By reason of the fact that two reporters were used; that partial transcripts were prepared for certain witnesses; that the settling of the charges and the jury charges are reported in a separate Volume of the transcript and that there were both pretrial and post trial hearings, the transcripts (TR) have been referred to in the following manner:

VOLUME	TRANSCRIPT
1-A	Hearing on MOTION TO DISMISS ON CONSTITUTIONAL GROUNDS, October 25, 26, 1973
1-B	Testimony of MIRO MIZERA, March 5, 1974
1-C	Testimony of MIRO MIZERA, March 6, 1974
1-D	Testimony of WILLIAM KEITH and GREGORY K. STONE, March 7, 1974.
1-E	Testimony of ROBERT BROADBENT, March 7, 1974.
1-F	Testimony of ROBERT BROADBENT, March 11, 1974.

[1]Zeldin offered no evidence at the trial, nor did he offer the instructions relating to entrapment, which were refused by the Trial Court. He did not employ, nor participate in any meetings with the Attorney, whose flagrant breach of duty at the behest of the State, permitted the creation of the crime by the State. His Petition for Rehearing was denied by the Ninth Circuit Court of Appeals on June 29, 1976 and Certiorari was denied on November 8, 1976, following his Petition numbered 76-96 on the Docket of this Court.

VOLUME	TRANSCRIPT
1-G (Vols. IV-VIII)	Further trial testimony March 11 through March 14, and March 18 through March 23, 1974.
1-H	Partial Transcript of testimony of WILLIAM W. MORRIS, March 18, 1974.
1-I	Proceedings re SETTLING OF INSTRUCTIONS and INSTRUCTIONS TO JURY, March 20, 22, 1974.
1-J	Post-trial hearing on MOTION TO DISMISS and SUPPRESS (WIRE TAP ISSUES), November 25, 1974.

At the time of the commission of the alleged criminal acts, Wilson resided in and maintained his Offices for the practice of architecture in Los Angeles County, California. He had designed many substantial buildings, including the Las Vegas Convention Center. He was 74 years of age. His wife of many years was dying. (TR 1-G, pgs. 1390-1394, 1398) He owned a parcel of unimproved land in Clark County, Nevada. He was contacted by a Real Estate Operator named Miro Mizera (an unindicted co-conspirator in this case), who was licensed by the State of Nevada to engage in the sale of realty. Mizera contacted Wilson by telephone, by letter, and in person, and persuaded Wilson to engage him as a Real Estate Agent for the purpose of selling the unimproved realty. In soliciting Wilson, Mizera, on July 27, 1971, represented that he had developers interested in his property for development and that they would use Wilson's services as an architect. (TR 1-B pgs. 162, 163). The Agreement between Mizera and Wilson became Exhibit 1 in evidence and is dated April 20, 1972, and outlined the responsibilities of the parties and the compensation Wilson was to pay Mizera for his services, including the obligation to pay Mizera in the event a zoning change was granted with

respect to the use of the property. Mizera then proceeded to seek to obtain the desired zoning change from the Board of County Commissioners of Clark County, following a denial of Wilson's zoning change request by the Clark County Planning Commission.

On April 20, 1972, the day after Mizera had met with Wilson and his attorney to obtain the Agreement from Wilson relating to the commission for selling the property, Mizera contacted Robert Broadbent, who was a Commissioner on the Board of County Commissioners of Clark County, Nevada. The contact was made at a Drug Store owned by Mr. Broadbent in Boulder City, Nevada, a suburb of Las Vegas, and within close proximity to the Local Police Department. At the time of this contact, Mizera stated to Broadbent that the property zoning should be changed on its merits and said, "Mr. Broadbent, I hope we can do this in some legal way. You are running for reelection and we would like to give you a contribution. If there is a legal way to do this, please tell me how it is to be done." (TR 1-B, pg. 52; TR 1-E, pg. 398). Broadbent, who believed that campaign contributions were made by people with special interests (TR 1-F, pg. 12), took Mr. Mizera's offer of a campaign contribution to be a bribe. (TR 1-E, pg. 510). He was well acquainted with the police Chief of Boulder City, Nevada, and the Sheriff of Clark County, Nevada, where the offer occurred and trusted both men. (TR 1-E, pgs. 510, 511)

Immediately following this meeting, Broadbent counseled with his campaign manager, Allan Reeves as to what a report of this matter would do to him politically, (TR 1-G pgs. 1573-75). He then called the Nevada Attorney General, Robert List, stating to him that he had been offered an illegal bribe and asked him what he should do about it. (TR 1-E, pg. 38). On the following day, the Attorney General's Investigators came to Mr. Broadbent to transcribe his conversations with Mr. Mizera. Tele-

phone taps were commenced of Mr. Mizera's telephone and Mr. Mizera was encouraged to contact other members of the Board of Commissioners with the same offer he had made to Mr. Broadbent, all under the direction of the Attorney General of Nevada. Broadbent became an Agent of the State of Nevada on April 21, 1972 and on April 24, 1972 a transmitter was placed on his body by a member of the Las Vegas Police Force to transmit to the Attorney General's Agents all conversations with Miro Mizera, (TR 1-E, pgs. 391, 392, 396, 397, 404, 405, 408) and acted from that date under the direction of the Nevada Attorney General (TR 1-E, page 494), who was aware of all conversations had with Mizera by Broadbent. (TR 1-A, pg. 53; TR 1-E, pgs. 525-527). The investigation prior to May 19, 1972 was centered on Mizera according to the Attorney General (TR 1-A, pgs. 67, 68, 72, 73).

Broadbent told Mizera that he thought the zoning proposed by him was good zoning, even though he believed it to be bad. He also told Mizera many things as they came up, which he thought would move the case along, at the suggestion of the Attorney General, including a willingness to cooperate with Mizera and to accept money from him. (TR 1-A, pg. 70; TR 1-E, pgs. 523-525).

At a meeting between Wilson and Mizera relating to Mizera's agreement for commission, Wilson's Los Angeles Counsel, on April 19, 1972, called an Attorney by the name of Thomas Bell, in Las Vegas to seek representation of Wilson. (TR 1-G, pgs. 1370-1376, 1381.) Bell, being unable to handle the matter, referred Wilson to an Attorney who officed with him by the name of William Morris, who represented large builders and specialized in administrative law and zoning matters before the City and County Planning Commissions. Morris was also a member of the Board of Regents of the University of Nevada. (TR 1-G, pgs. 1230-1232, 1234, 1235, 1245). Wilson, Mizera and Morris met in Las Vegas on April

27, 1972, and Morris agreed to represent Wilson before the Board of Commissioners of Clark County for a total fee of $10,000, demanding an immediate $5,000 retainer, which Wilson then and there paid to him by check. (TR 1-G, pgs. 1239, 1240, 1257, 1258) (TR 1-H, pg. 415). Morris advised both Mizera and Wilson that all matters pertaining to the zoning change were to be handled by Morris, and no one was to contact any of the Commissioners, except through Morris. (TR 1-G, pg. 1240, TR 1-H, pg. 5). Without telling Morris or Wilson, on April 25, 1972, Mizera advised Broadbent of the appointment and, immediately after its occurrence, of the meeting and of Morris' instruction. (TR 1-E, pgs. 394, 395, 397-398). The conversation was overheard and recorded by the Attorney General's Investigators (TR 1-E 403). Immediately upon receipt of Mizera's information, Broadbent, through his former campaign manager, Allan Reeves, caused Morris to get out of the case, to keep his mouth shut and to quit representing Wilson because it would hamper the investigation, Morris thought, of an illegally and improperly acting real estate agent. (TR 1-E, pgs. 432-433, 457, TR 1-G, pgs. 1253, 1553-1556, 1567, 1571, TR 1-H, pgs. 6-8). Reeves advised Broadbent that he had contacted Morris and it was his feeling that Morris was going to get out of the zoning case. Within one week of his action, and prior to the date on which Mizera became an Agent of the State, Mr. Broadbent advised the Attorney General, under whose direction he had been acting, of what he had done and the Attorney General stated that he was just as happy to see Morris out of the case. (TR 1-E, pgs. 488-495, TR 1-G, pg. 1247). The Attorney General was kept abreast of what was happening in the case on a daily basis, frequently receiving four or five telephone calls a day (TR 1-A, pg. 53). In fact, the Attorney General, on May 2, 1972, actually directed Broadbent as to the ultimate objective of the May 2 meeting and the procedure he was to use (TR 1-F,

pg. 232-4). Morris, however, before Mizera passed any money to Ryan, advised other County Commissioners, including the Defendant Ryan, that the Attorney General's Office was bugging everyone and that if he, Ryan were offered a bribe, he was to take the money and to call the Sheriff, or the District Attorney, of Clark County. (TR 1-G, pgs. 1269-1273; 1-H, pgs. 11, 12, 17 and 18). At no time did Morris ever advise Mr. Wilson, or his Los Angeles attorney, of any activities or conversations, with the Agent of Nevada Attorney General, Broadbent, through Reeves, or with any Commissioner, and he believed that he was remiss in not telling Wilson his true reason for his withdrawal from the case. (TR 1-G, pgs. 1245, 1269; 1-H, pg. 15). Thereafter, Broadbent discouraged Mizera from getting other Counsel for Wilson and Wilson did not obtain other Counsel to represent him in connection with the zoning matter. (TR 1-C, pgs. 240 and 242; TR 1-E, pg. 465.) Mr. Morris returned the retainer and corresponded with Wilson, giving a false reason for withdrawal on May 1, 1972. Wilson's Exhibits "G" and "H". (TR 1-G, pgs. 1242-1244). On May 2, 1972, Broadbent was shown the correspondence between Wilson and Morris at a meeting set up by Broadbent at the Attorney General's request by a subterfuge to cause Mizera to be at the meeting. (TR 1-E, pgs. 404, 405-407, 495.)

On May 16, 1972, the Attorney General's personnel caused Broadbent to call Mizera and to say that he could no longer vote for Mizera's proposed zone change and used as an excuse the falsehood that he had had friends involved in the area who had asked him not to support it. Mizera became very distraught (TR 1-E, pgs. 424-426, 496, 497). The May 16, 1972 conversation had been made by Broadbent because the Attorney General's Office believed that there was no bribery activity. (TR 1-E, pgs. 539, 540; TR 1-F, pgs. 25, 26).

On May 19, 1972, the Attorney General's Staff proceeded to cause Mizera to become an Agent for the State, by virtue of direct threats to preclude Mizera from getting medical treatment to alleviate terrible headaches, which made him highly dependent on certain drugs, and lies, a portion of which are set forth in the Opinion of the Court of Appeals, and the balance of which are set forth in CR Vol. 3, pgs. 538 to 579 in a typed transcript, which does not convey the emotion in tape No. 45 (Ryan's Ex. E, TR 1-J, pg. 117) from which it is transcribed. The coercion of these actions ultimately resulted in Mizera allowing himself to be fitted for recording equipment, so that he could approach the Defendant Ryan in a planned effort to obtain statements which might incriminate Ryan. Mizera relied upon the statements made by the Attorney General's Office such that no one could help him, but the Attorney General. (TR 1-C, pgs. 212-214, 367, 368; TR 1-J, pg. 117-Ryan's Ex. "E"). The State's Agents also told Mizera they wanted to involve Ryan, but did not want to involve Wilson and agreed with Mizera not to involve Wilson (TR 1-C, pgs. 230, 310, 311) and as is hereinafter set forth, the Attorney General brought criminal proceedings in the State Courts only against Ryan. The Agents of the Attorney General from the 19th of May until the 23rd of May 1972 kept Mizera virtually imprisoned (TR 1-C, pgs. 318-322). The State's Agents rehearsed with Mizera what he was to say to Ryan. (TR 1-C, pgs. 312-314).

Mizera testified at the trial that the offering of a campaign contribution to the Commissioners was his idea; that he believed he was doing nothing wrong and that Wilson was innocent (TR 1-B, pgs. 145, 146, 149; 1-C pgs. 193, 211, 342-346, 362). The Attorney General had known of Mizera's migraine headaches, his extensive and addictive use of medication and his need for money to cure his condition since April 20, 1972 (TR 1-E, pg. 413). See also TR 1-C, pg. 333 relating to Mizera's use of drugs.

The hearing on the zoning change was set for May 22, 1972. Wilson came to Las Vegas on May 22, 1972. At that time, Mizera was fitted with a recording device to obtain statements from Wilson. The knowledge of his arrival is set forth in a tape of May 15, 1972, a transcript of which was admitted for the purposes of the Alderman hearing on November 25, 1974. (TR 1-J, pgs. 14, 30-43) (Wilson Exhibit B).

The Attorney General's Office advised Broadbent to vote for the zoning change, if the approval did not seem imminent of passing. (TR 1-E, pgs. 528, 529; 1-F, pgs. 5, 6). The Zone Change Meeting was held on May 22, 1972 and was approved on a 3 to 2 vote, with Commissioners Ryan, Levitt and Weisner voting for the change and Brennan and Broadbent against the change. Commissioner Weisner believed that he had been misled by Commissioner Broadbent. (TR 1-F, pg. 17).

Immediately following the meeting, Mizera, acting on the instructions of the Attorney General's Office, sought to pass moneys to Ryan who, when arrested an instant after Mizera had handed him some $6,000, which Wilson had obtained from a check he cashed in Los Angeles, promptly called Attorney Morris, who came to Ryan's house to consult with him on the matter. (TR 1-H, pgs. 18 and 19).

On May 24, 1972, a criminal complaint for bribery was filed against the Defendant Ryan in Clark County, Nevada, on May 24, 1972. Before the preliminary examination, the matter was taken before the Clark County Grand Jury, which, on June 15, 1972, returned a No True Bill Report. On July 25, 1972, a preliminary hearing was had before a Magistrate on an information filed by the Nevada Attorney General against Ryan which was dismissed for lack of probable cause. (TR 1-A, pgs. 812-813). The Nevada Attorney General filed an information against Ryan on August 8, 1972, which was held by the Nevada Supreme Court to be invalid (TR 1-A, pgs. 11, 14, ***Ryan v. Eighth***

Judicial District, 503 P.2d 842). Defendants' Exhibits A, B and C, October 25, 1973 (hearing TR 1-A). The Nevada Attorney General, at the time of the filing of the proceedings against Ryan, had information about all of Wilson's activities and it was the Attorney General's intention to proceed just against Ryan and then against Wilson. (TR 1-A, pg. 32). The Nevada Attorney General believed that he could refer the matter to the Clark County District Attorney and that the District Court could allow the District Attorney to file an information. (TR 1-A, pg. 18). He told the United States Attorney that it was an important case to the people of Clark County, Nevada. (TR 1-A, pg. 34). The District Attorney of Clark County was not requested to proceed against any Defendants herein even though the Attorney General had conferred with him immediately after the dismissal of the information filed against Ryan. (TR 1-A, pgs. 38, 39). The Attorney General did not lack confidence in the Clark County District Attorney (TR 1-A, pg. 75). The assistance of the United States Government was not sought until the Nevada Attorney General was in a position where the State could no longer proceed against the Defendant Ryan, because too much time had run from the dismissal by the Magistrate of the Complaint. It was at the initiation and suggestion of the Nevada Attorney General that the United States Attorney first became interested in the case, even though he knew of its existence and quite a bit about the case from May 23rd 1972 (TR 1-A, pgs. 98-99). The United States Attorney, who was newly appointed, had determined that, as long as the matter was in the State Courts, that is where it belonged unless there are compelling reasons for it to be in Federal Court. (TR 1-A, pgs. 18, 19, 31, 94-96). In fact the Nevada Attorney General telephoned the United States Attorney, told him he would like to talk to him and the United States Attorney then came to the office of the Attorney General to discuss the matter (TR 1-A, pg. 20). On January 19, 1973, the United

States Attorney asked the Special Agent in charge of the Las Vegas F.B.I. to make an investigation. On January 25, 1973, an agent was assigned and commenced the investigation in the present case (TR 1-A, pgs. 81, 82) which the U.S. Attorney believed to be an isolated case of bribery (TR 1-A, pg. 111). The District Court, on October 25 and 26, 1973, had a hearing on the true question of jurisdiction and determined that the question was a close one (TR 1-A, p. 202).

In the course of the trial, Wilson offered the following jury instructions which the trial court refused to give:

WILSON INSTRUCTION W-D

"IF YOU FIND THAT THE PARTICIPATION OF THE OFFICERS AND AGENTS OF THE STATE GOVERNMENT, IN THE CREATION AND PROMOTION OF THE CRIMES CHARGED IN THE INDICTMENT, WAS, TO THE EXTENT THAT IT CONSTITUTED CREATIVE ACTIVITY ON THE PART OF THE OFFICERS AND AGENTS OF THE STATE OF NEVADA, THEN YOU MUST FIND THE DEFENDANTS NOT GUILTY." The instruction bore the notation that it was derived from *Greene v. U.S.* (9th Cir. 1971) 454 F.2d 783.

WILSON INSTRUCTION W-E

"Canon 5 of the Code of Professional Responsibility and Canons of Judicial Ethics of the American Bar Association, and of the Nevada State Bar Association, states as follows:

"THE PROFESSIONAL JUDGMENT OF A LAWYER SHOULD BE EXERCISED, WITHIN THE BOUNDS OF THE LAW, SOLELY FOR THE BENEFIT OF HIS CLIENT AND FREE OF COMPROMISING INFLUENCES AND LOYALTIES.

NEITHER HIS PERSONAL INTERESTS, THE INTERESTS OF OTHER CLIENTS, NOR THE DESIRES OF THIRD PERSONS, SHOULD BE PERMITTED TO DILUTE HIS LOYALTY TO HIS CLIENT."

WILSON INSTRUCTION W-F

"THE FUNCTION OF LAW ENFORCEMENT IS THE PREVENTION OF CRIME AND THE APPREHENSION OF CRIMINALS. THIS FUNCTION DOES NOT INCLUDE THE MANUFACTURING OF CRIME.

"IF YOU FIND FROM THE EVIDENCE IN THIS CASE THAT THE CRIMES CHARGED IN THE INDICTMENT IN THIS MATTER WERE, IN FACT, COMMITTED, BUT THE EVIDENCE IN THE CASE LEAVES YOU WITH A REASONABLE DOUBT WHETHER THE DEFENDANTS, OR ANY OF THEM, HAD THE PREVIOUS INTENT OR PURPOSE TO COMMIT ANY OFFENSE OF THE CHARACTER HERE CHARGED, AND DID SO ONLY BECAUSE HE WAS INDUCED OR PERSUADED BY SOME OFFICIAL, OR AGENT, OF THE STATE OF NEVADA, THEN IT IS YOUR DUTY TO ACQUIT HIM.

"FOR PURPOSES OF THIS INSTRUCTION, ROBERT BROADBENT WAS AN AGENT OF THE GOVERNMENT FROM APRIL 20, 1972 TO MAY 23, 1972, AND MIRO MIZERA WAS AN AGENT OF THE STATE OF NEVADA FROM MAY 19, 1972 TO MAY 23, 1972." This intruction bore the notation that it was derived from *Sherman v. U.S.* (1958) 356 U.S. 369 and from *Devitt & Blackmar* Section 13.13.

WILSON INSTRUCTION W-G

"WHEN THE GOVERNMENT BECOMES ENMESHED IN CRIMINAL ACTIVITY, THE SAME UNDERLYING OBJECTIONS AS THOSE CONCERNED WITH ENTRAPMENT ARE OPERATIVE. SHOULD YOU DETERMINE THAT, IN THE CIRCUMSTANCES OF THIS CASE, THE GOVERNMENT'S ACTIVITY, THROUGH ITS AGENT, OR AGENTS, HELPED TO INITIATE THE CONDUCT WHICH IS THE SUBJECT OF THIS ACTION, THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT ITS ACTIONS WERE NOT THE INDUCEMENT OF THE CRIMES ALLEGED AND, UNLESS THE GOVERNMENT DOES SO, YOU MUST ACQUIT THE DEFENDANTS." This instruction again referred to *Greene v. U.S., supra,* as its source.

The instructions are discussed briefly by the Court of Appeals, in its Opinion, on the theory that Wilson had not objected, as required by Rule 30 of the Federal Rules of Criminal Procedure, and even if he had, his proposed instructions were contrary to the clear holding of *United States v. Russell,* (1973) 411 U.S. 423 as involving the objective standard. The transcript of the proceedings in the District Court, however, in 1-I, p. 3, discloses that at 5:25 o'clock P.M. on March 20, 1974, the Court said: "Let's go on the record. We've been here since early afternoon with Counsel settlings instructions that we've discussed." In Chambers, the Court had denied the instructions relating to entrapment (TR 1-I, pg. 849) on the basis of its understanding that the law in the Ninth Circuit required admission of the crime, unless denied commission of a crime and, therefore, he was not entitled to entrapment instructions. It was stipulated, at the Court's request, that after the Court's instructions to the jury and Counsel are called to side bar, that there

could be incorporated into the record the settlement of instructions which had been discussed in Chambers, in lieu of doing it again following the Court's instructions to the jury and before the jury retires. (TR 1-I, pg. 10). The Court, after instructing the jury on March 22, 1974, then called Counsel to the side bar (TR 1-I, pg. 59) and the Stipulation desired by the Court was entered into. The Court stated that it had given all the instructions it had indicated it would give when they were settled in Chambers, and so it had refused to give certain instructions that were proposed then "and I think were made of record, hoping to save time." (TR 1-I, pg. 61). Thereupon Counsel for Wilson stated, in response to the Judge's request, that he had no objections to the instructions, save those that were made in Chambers and that he would stipulate that these were made in open Court.

The utilization of such informal proceedings, without recordation of the discussion, has long been the custom in Nevada and, in fact, an entrapment instruction had not been given by the Court because it was of the belief that the Ninth Circuit really required the admission of a criminal act, including the confession to criminal intent, in order to give an entrapment instruction. It is clear from the oral statements relating to his refusal to give the entrapment instruction that the Court was of this opinion. (TR 1-I, pg. 8, lines 19 to 25; pg. 9, lines 1 to 19). However, while the Brief stood submitted, the Ninth Circuit, in the case of *United States of America v. Demma* (9th Cir. 1975) 523 F.2d 981, expressly overruled *Eastman v. United States,* (9th Cir. 1954) 212 F.2d 320, 322 and its progeny, on the ground that the *Eastman* Rule, by conceding the crime charged, as well as the constituent acts thereof, conflicted with the cases of *Sorrells v. United States,* 287 U.S. 435; *Sherman v. United States,* 356 U.S. 369 (1958) and *United States v. Russell, supra.* The Decision was pointed out to the

Court of Appeals, but no discussion appears in the Opinion relating to the impact of the failure to give the instruction based upon *Eastman v. United States, supra.*

The Circuit Court also, in discussion the due process question, Appx. A-8-13, believed that the activities of the Nevada Attorney General, in the manner of treatment of Mizera, did not violate the due process rights of the Petitioner. It did not discuss at all, however, the activities relating to the removal of William Morris, merely dismissing it on the ground that Broadbent was acting independently and was not acting as a State Agent. Appx. A-14. The Court did not, in any manner, discuss Ryan's activities in taking the money at Morris' instruction and all of Morris' reasons for leaving the case and concealing from his client the true reason for his leaving, and concludes, Appx. A-10, that *Hampton v. United States,* (1976) 425 U.S. 484 in some manner, indicates that the type of State activity in this case is approved of by the Supreme Court, under the holding of *United States v. Russell, supra.* In short, there is no analysis of the false statements and threatening acts utilized by both Broadbent and other agents of the Attorney General which were aimed at the defendant Ryan but which led to Wilson becoming a defendant. The jury could have also concluded that Mizera was under the control of the Attorney General from April 22, 1972 and the activities of Broadbent as to him when combined with the other actions involving Morris constituted creative activity against someone not predisposed to commit a crime.

REASONS FOR GRANTING THE WRIT

The issue in this case is of fundamental importance to the manner in which the Government may conduct legitimate investigations of alleged criminal activity, not involving contraband. The Decision in the District Court that the defense of entrapment requires the admission

of the state of mind necessary to constitute the crime charged, as well as the constituent acts, is in direct conflict with *Sorrells v. United States, supra,* and specifically in conflict with the burden which the Government bears by relieving the Government of the necessity of proving that the acts of the Nevada Attorney General were non-entrapment. It conflicts with the Rule set forth in *United States of America v. Demma, supra,* as well as the Rule set forth in other Circuits where the evidence, from which entrapment could be adduced, has been placed in the record as a part of the Government's case in chief *Sears v. United States* (CA 5th 1965) 343 F.2d 139, 143; *Henderson v. United States* (CA 5th 1956) 237 F.2d 169, 175 [involving State Officers]. It flies in the face of the rationale of the doctrine of entrapment to the effect that Statutes should not be enforced by tempting innocent persons into violations, *Sherman v. United States, supra,* 372, and it is, thus, that the predisposition and criminal design of the Defendant must be determined as set forth in *Russell.*

The Court of Appeals ignores entirely the due process clauses of the Fifth and Fourteenth Amendments, as well as the inherent necessity as enunciated by a majority of this Court in *Hampton v. United States, supra,* requiring that the Court, in its analysis not only examine into predisposition, but also consider whether fundamental fairness bars a conviction. Justice Powell quoted from *Sherman v. United States, supra,* at page 381 and *United States v. Archer* (2d Cir. 1973), 486 F.2d 670 to the effect that there is a responsibility in the Courts of keeping the dangers of overzealous law enforcement in check, and that the records are replete with examples of situations in which the Court will enforce the concept that due process means fundamental fairness and will overrule the Court where such fairness has been denied to an accused.

To put it another way, it appears that one of the bases for the summary dismissal of the petitioner's argument relating to the conduct of the Attorney, William Morris, is predicated upon the assumption that he was part of the plot in that he was contacted by Mizera and advised of the scheme. (Appx., pg. A-3). There is no place, at any point in the transcript, where it is pointed out that the presumption of the engagement of an Attorney is that he will perform his duties in an illegal manner, nor do the facts, in any way, support such a conclusion of the Ninth Circuit. Counsel would not urge the removal of Morris as one of the grounds for this Petition if there existed any evidence whatsoever that Mizera had informed Morris of any bribery scheme. In fact, it is obvious that the fee for the Attorney involved is more than the amount alleged to be paid to Ryan. Therefore, it must be presumed that Wilson intended to obtain rezoning in a lawful manner, until the State caused his Attorney to be removed and to conceal from his client the facts of the case. To refuse to instruct a jury as to the duties of an Attorney, is to indict the entire legal profession and the reason for its being. This is particularly true when one looks at the involvement of that Attorney with the Defendant Ryan, and with the State's Agent Broadbent, and the critical period of time when he was removed from the case, as well as the substantial amount of money paid and to be paid by the Defendant Wilson to Morris to perform his services. A jury could have considered, under an entrapment instruction, whether the removal of an Attorney representing a defendant with an unblemished record made it possible for Mizera, acting under the control of the same agent of the State who caused the attorney's removal, to induce Wilson to undertake the acts which violated the Travel Act. However, says the Court of Appeals, Appx. A-14, Broadbent was acting privately even though it concedes on April 24, 1972, he

was a government informer. Appx. A-3. The government may not make use of an informer and then claim disassociation through ignorance. *Sherman v. U.S. supra,* 375; cf. *Johnson v. United States* (D.C. Cir. 1963) 317 F.2d 127, 128-130. In any event, it is submitted that, if the Court did not agree with the form of entrapment instructions proposed by Defendant Wilson. In this regard, it appears that proposed Instruction F would require the jury to determine predisposition and inducement, and that Instructions D and G were but a shorthanded Rule of *Hampton, supra,* and could have been utilized for the inducement aspect all entrapment cases, then the Court should have, on its own motion, given an appropriate instruction. This appears to be the Rule in the Fifth Circuit. *United States v. Kirk* (5th Cir. March 19, 1976), 528 F.2d 1057, 1062, 1063, *United States v. Young* (5th Cir. 1972), 464 F.2d 160, 164, and see the Rule in California at the State level, *People v. Grantham,* (1972) 26 C.A.3d 661, 665; 103 Cal. Rptr. 262 based upon *People v. Perez,* (1965), 62 C2d 769, 775-776; 401 P2d 934, enunciating the Rule now adopted in the Ninth Circuit, that a defendant may properly contend unlawful Police conduct amounting to entrapment, without conceding that he must also show his guilt. In short, the Court of Appeals is ignoring its ruling in *United States of America v. Demma, supra,* and which sought to bring the Ninth Circuit in line with the cases of *Sorrells, Sherman* and *Russell, supra.* In requiring an admission of the crime, clearly the court would be violating Wilson's Fifth Amendment rights and his right to the equal protection of the laws. *U.S. v. Demma, supra.* See also Groot, "The Serpent Beguiled Me and I (Without Scienter) Did Eat — Denial of Crime and the Entrapment Defense," 1973 U. Ill. L. F. 254.

The Court of Appeals in refusing to consider the instructions offered by Wilson's attorney has simply ignored the purpose of Rule 30, Fed. R. Crim. P.: (1) to

give the Trial Court fair opportunity to correct any mistakes in its proposed jury instructions, *U.S. v. Martin,* (8th Cir. 1975), 511 F.2d 148, 150, and (2) to require the Judge to inform the Trial Lawyers in a fair way what the charge is going to be, so that they can intelligently argue the case to the jury. *Wright v. U.S.* (9th Cir. 1964), 339 F.2d 578, 580. Counsel had spent at least one-half of a Court day settling instructions. John Bartlett had clearly set forth his reasons and the Court had relied on the Ninth Circuit Rule requiring admission of the crime, which was later charged. What purpose would be served by further objection, in light of the Nevada procedure? Certainly, the cases construing the Civil counterpart of Rule 30, 28 U.S.C.A. 51 do not require more. If it was error to not give the proffered instruction, then the error cannot be disregarded as not affecting Appellant's substantial rights, in light of the facts which existed relating to the acts of the Government, and Rule 52 (b) of Title 18 U.S.C.A. should come into effect, since the trial became unfair when the jury could not determine if Wilson was entrapped. cf. *Carson v. U.S.,* (9th Cir. 1962) 310 F.2d 558, 560, 561 and *U.S. v. Sherman,* (2d Cir. 1952), 200 F.2d 880, 883 (no exception by Defendant).

The type of activity of the Nevada Attorney General, which occurred in this case, if condoned, will simply be an encouragement for the performance of police work which should not, under any circumstances, be sanctioned, where it tends to rip the fabric of our System of law and order, and where it smacks of the utilization of the third degree. In short, the means used by the Government to "make" this case are essentially revolting to an orderly Society and ought not to be countenanced by this Court. *Greene v. United States,* (9th Cir. 1971), 454 F.2d 783, 787 (where the Government's activities have risen to the level of creative activity) and the concurring

Opinion of the Chief judge of the Fifth Circuit in *Williamson v. United States* (1962), 311 F.2d 441, 445. Thus, even if the Court believes that there was no issue of fact on predisposition or inducement, it is submitted that this is the case described in *Russell v. United States, supra,* that the conduct of law enforcement agents is so outrageous that the Government is not allowed to obtain a conviction. See also *United States v. Archer, supra,* 676-677. In short, is the use of the third degree against a man's agent, in order to get him to carry forward a crime, and the prior removal of a man's attorney, who would perform a function in a lawful manner, any less unthinkable than permitting the Government's agents to instigate robberies and beatings merely to convict other members of a gang of hoodlums? Were not all restraints removed which prevented commission of bribery when Wilson's Lawyer was removed, who presumably would lawfully obtain a zoning change? If, as the Court of Appeals stated, Mizera had no place to go, was it necessary to threaten him and coerce him by stating that, in prison, he would not be able to get his headaches treated and he would not be able to see his boy and by virtually imprisoning him?

By refusing to give Instruction "E", the Court left the jury without any guidelines as to whether or not Morris left because his client was participating in a crime. The jury could certainly have inferred this to have been the case without a proper instruction, although there is no reference in the record to justify this conclusion. Trial Counsel was left in the position of not being able to argue and protect the rights of Wilson to the effect that Wilson was dealing with a licensed Nevada real estate agent and a Nevada licensed attorney, and was trying to get a zoning change and there was no need for him to participate in any improper activity. Should not Morris have been in a position that should have required him to disclose to his client that Mizera was being

investigated for criminal activities, and that he, Morris, was advising the Commissioners including Ryan of the activities of this man?

The Supreme Court has been greatly concerned with the proliferation of criminal proceedings at the Federal level. If, under the facts of this case, the Federal Government may prosecute a resident of the State of California, admittedly not a member of organized crime, then it seems that the recent rulings of this Court, and recently adopted Rules relating to the filing of Petitions for Habeas Corpus, are meaningless.

However, the ruling of the Court of Appeals is also contrary to *Rewis v. United States, supra* and conflicts with the cases in other Circuits, such as *United States v. Archer, supra, United States v. Isaacs* (7th Cir. 1974), 493 F.2d 1124, 1146, 1147 to the effect that, where the use of Interstate facilities was minimal, and incidental and peripheral to the activities of the defendants, it was error to submit to the jury a charge of Travel Act violation. In *U.S. v. Isaacs, supra,* which involved bribery of a state official, three checks were taken, either by truck, or by air express, into the States of Missouri and Illinois. The Court reviewed *United States v. Altobella* (7th Cir. 1971) 442 F.2d 310 involving extortion. *Altobella* had concluded that, although the Travel Act could be read to cover the case of a victim who gave a check which cleared through a Chicago Bank and was forwarded to Philadelphia, more than such minimal interstate activity incidental to the alleged criminal activity was contemplated by Congress before federal intervention would be warranted. In *Isaacs* the court further concluded that the incidental use of a federally regulated banking facility does not furnish the jurisdictional element of a Travel Act offense. In short, in light of *Rewis,* sensitive Federal-State relationships are being altered, if, under the facts of this case, Travel Act viola-

tions are prosecuted by the Federal Government. None of the Interstate contacts were necessary to, or directly connected with, the commission of the crime. Had Wilson been a resident of Nevada, clearly the only prosecution which would have been allowed by the Federal Courts would have been in the State Courts. The sole reason for the prosecution was that the Attorney General for the State of Nevada so badly handled the matter in the State Courts, that the State could no longer proceed against the the Defendant Ryan. Up to the time of the Federal indictment, neither Zeldin nor Wilson had any charges filed against them. Yet if one examines the Nevada statute re offering a bribe and listens to Broadbent's version of what transpired, Mizera was guilty on April 24, 1972. Why not arrest him and bring charges against Wilson at that point? Why seek to expand the crime into a violation of a Federal statute? The Nevada Attorney General believed he had an adequate basis for proceeding against these gentlemen, but he neither advised the Local District Attorney to prosecute any of the defendants herein and the essential Statute was clearly a Local Statute, under which a prosecution could have been brought. In truth, is this any different from the situation in *United States v. Brouillette,* (5th Cir. 1973) 478 F.2d 1171, another Travel Act case where the evidence did not contain sufficient probable cause that a Federal crime had been committed, and the supporting Affidavit for Search Warrant had absolutely no factual basis that the channels of Interstate Commerce were being used contrary to Federal law? In other words, if, in this case, the District Court is affirmed, contrary to the Rule in other Circuits, Federal Agents will be permitted to search for State statutory violations and then try to turn them into Federal violations. It would open up more new areas for Federal prosecution and again lead to searches, where Federal agents know that only a State crime was being committed, but that a search would turn up enough evidence for a Federal crime.

The provisions of Title 18 §§ 2511(c) (d) and Section 2515 make inadmissible the tapes obtained by Mizera and his refreshed recollection of taped conversations after May 19, 1972, if Mizera became an involuntary agent of the State on and after that date. See *U.S. v. Franks* (6th Cir. 1975) 511 F.2d 25.

Furthermore, any recordings or information not obtained in compliance with §§ 2516 and 2518 of Title 18 are inadmissible. *Alderman v. U.S.* (1969) 394 U.S. 165, 89 S.Ct. 961, 22 L. Ed. 2d 176; *U.S. v. Giordano* (1974) 416 U.S. 505, 94 S.Ct. 1820, 40 L. Ed. 2d 341. Clearly the statute was not complied with in order to obtain the original Mizera transcriptions from which the Attorney General learned that Wilson would be at the Desert Inn on May 21. Wilson's Exhibits A, B, and C (TR 1-J, pgs. 14 and 115). Judge Hufstedler describes the various acts which made Mizera's consent involuntary and coerced in his dissent. Appx. A-15, 16. As set forth in the Statement of Facts, Mizera's physical and economic condition made him susceptible to all of the pressures applied to him. However, before May 19 he had, at the Attorney General's direction, been softened by Mr. Broadbent's acts. Before that time, he had been led into the position which served as the basis for the threats relating to imprisonment by the actions of the agents of the State.

The majority, Appx. A-10, concedes that the Government's treatment of Mizera was not exemplary and lacked restraint but reasons that it was not so grossly shocking and outrageous as to violate the universal sense of justice, because, although he was unadvised by counsel, he had no practical alternative but to cooperate, since in hindsight he was guilty in any event. While one might be persuaded reasonably to cooperate, it is respectfully suggested that the activities utilized by Attorney General were those of the Police State and should not be permitted by this court. The five factors summarized by the

court Appx. A-9, 10 do not include Mizera's virtual arrest and custody and the statement relating to his boy nor his physical and mental history which was obviously that of an unwell man. The authorities set forth in the dissent from the refusal to grant an en banc hearing simply demonstrate that actions such as those utilized against Mizera will not be tolerated and that his consent was coerced. Therefore, without regard to the arguments relating to the failure to give entrapment instructions, the petitioner's due process rights have been violated in the admission of the post May 19, 1972 tapes.

CONCLUSION

Wilson has, at a minimum, been denied from having a jury weigh the question of whether he had a criminal predisposition and had been entrapped. The Ninth Circuit Court should not be permitted to expand crimes, which can be adequately prosecuted under Local Statutes, into Federal crimes. This Court should not countenance, by affirming the Judgment, the creative criminal activities of the Local Law Enforcement Officers based upon the deliberate removal from a client of his lawyer, who was performing his function in a legitimate and lawful fashion. However, it is respectfully urged to this Court that the conduct of the Nevada Officials utilized in the prosecution of the Travel Act violations established entrapment as a matter of law in the manner of *Sherman v. United States, supra.* Furthermore, as stated by Justice Frankfurter in his concurring opinion in *Sherman v. United States, supra* 384,

> ". . . The power of Government is abused and directed to an end for which it was not constituted when employed to promote, rather than detect, crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations

without government adding to them and generating crime."

In short, the only way it can be said that the actions of the State Officials do not constitute entrapment, in removing Wilson's lawyer, and in causing him to conceal from his client what was going on and in urging Ryan to take the moneys proffered by Mizera, and in using the obviously unstable and ill real estate agent to solicit Ryan, is to assume that the Member of the State Bar of Nevada hired by Wilson was, himself, participating in the crime from the moment he was hired and that Broadbent was not an agent of the State. There is absolutely no evidence in the record which would justify such assumption. For these reasons alone, the Writ of Certiorari should be granted.

Dated: December 27, 1976

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Revised: Nov. 30, 1976

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JAMES G. RYAN, *Defendant-Appellant.*	No. 75-1317
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ADRIAN WILSON, *Defendant-Appellant.*	No. 75-1314
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. BERNARD ZELDIN, *Defendant-Appellant.*	No. 75-1313 OPINION

[May 24, 1976]

Appeal from the United States District Court
for the District of Nevada

Before: WRIGHT, KILKENNY and TRASK, Circuit Judges.

TRASK, Circuit Judge:

Adrian Wilson, Bernard Zeldin and James Ryan appeal their convictions in Federal District Court for the District of Nevada for violation of 18 U.S.C. § 1952, the so-called "Travel Act," 18 U.S.C. § 371, the federal conspiracy statute, and 18 U.S.C.

§ 2, the aiding and abetting statute. They make several assignments of error, relating to the jurisdiction of the court below, the legality of evidence gathered by wiretapping and electronic surveillance and the general conduct of the government in investigating and prosecuting this case. In connection with this last issue, appellants Zeldin and Wilson also argue that the government intentionally interfered with their attorney-client privilege. In addition, appellant Ryan alleges that the evidence was insufficient to support the verdict against him as a coconspirator, appellant Wilson argues that the trial judge erred in refusing certain jury instructions, and appellants Zeldin and Ryan challenge the constitutionality of the Travel Act. For the reasons set forth below, we affirm all appellants' convictions.

Each of the appellants filed an opening brief emphasizing facts as they apply to his particular case. Mindful of these individual variations we review the facts in their entirety, considering them in the light most favorable to the government, which is the appropriate standard for appellate review of judgments of conviction. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Munns*, 457 F.2d 271 (9th Cir. 1971).

The case revolves around the attempt of appellant Wilson, a well-known architect and resident of Los Angeles, to have certain land he owned in Nevada approved for rezoning and acts of bribery committed to achieve this purpose. The rezoning decision was to be made by the Clark County Board of Commissioners. The central figure in this episode was one Miro Mizera, an unindicted coconspirator, a Czechoslovakian refugee in ill health and a licensed realtor in the Las Vegas area.

Mizera was interested in helping Wilson subdivide and sell his property. He visited Wilson in January 1972 in Los Angeles and told Wilson that rezoning could be accomplished only if a political contribution to the county commissioners were made. Mizera agreed to talk with Commissioner Ryan about this matter.

Mizera thereafter held a series of meetings with Ryan. At the first meeting, Ryan told Mizera that prospects for approval of the application were favorable. No discussion of a bribe or campaign contribution was made until the second meeting, when Mizera mentioned a $10,000 political contribution. After the Planning Commission, an advisory body, recommended rejecting

the rezoning plan, Ryan told Mizera that he (Mizera) would have to approach the other four commissioners himself.

Mizera was given an unenthusiastic reception by Commissioners Leavitt, Brennan, Wiesner and Broadbent, although all of them at least indicated to Mizera that the prospects for eventual approval of the plan were good. After meeting with Mizera on April 24, 1972, Broadbent telephone the state Attorney General and informed him that he thought Mizera had offered a bribe in exchange for his vote. Broadbent then agreed to cooperate with state authorities by "playing along" with Mizera and recording all conversations with him.

The following day, the Board of Commissioners voted to continue consideration of the application until May, when Wilson could more conveniently be in Nevada. Shortly thereafter, Mizera contacted a Las Vegas attorney, Morris, to inquire about the possibility of representing Wilson at the hearing. Exactly what terms were discussed between Morris and Mizera is subject to dispute, but it appears that Morris was informed of the bribery scheme. In any event, a retainer agreement between Morris and Wilson was consummated. Mizera then told Broadbent that Morris would be representing Wilson in the forthcoming commission meeting and detailed the scheme as it then stood. This conversation was recorded.

On April 27, Broadbent, acting through an intermediary, Reeves, told Morris that he was being led into a trap and that he should get out of the affair altogether. Morris then withdrew from the retainer agreement, returning the fee Wilson had paid him. This contact between Broadbent, who was serving as a government informer, and Morris gives rise to one of the issues on appeal.

Mizera continued to meet with Broadbent and Ryan in May. His purpose at this time was to have one of them take control of the bribery plot and work to ensure the votes of the other commissioners. In particular, Mizera wanted one of them to make the motion for rezoning at the meeting. On May 16, 1972, Broadbent, at the behest of state agents, told Mizera that he had to back out of the deal and would not be able to support the zoning application. There was no further contact between Mizera and Broadbent until after the Commission meeting.

Mizera was also in contact with appellant Zeldin during this time. Zeldin was a local businessman who was to take charge of the development of Wilson's land after approval of the rezoning plan. Zeldin went to Los Angeles to confer with Wilson concerning the bribery scheme and to obtain the bribery money which Wilson had borrowed from a Los Angeles bank. This interstate trip formed part of the basis for the indictment under 18 U.S.C. § 1952, the Travel Act.

After Broadbent withdrew from the plot, Mizera telephoned Zeldin, who was in Los Angeles, and the two discussed the problem of which commissioner would make the motion for approval of the application. This interstate conversation also formed part of the section 1952 indictment. The following day, May 17, 1972 Mizera met with Ryan and at this time Ryan said that he would make the motion. Thereafter, Mizera again telephoned Zeldin in Los Angeles.

On May 19, 1972, Mizera was approached by state agents and informed of the evidence they had amassed against him through his conversations with Broadbent. The state agents offered Mizera immunity from prosecution in return for his assistance. From that point forward, Mizera was a state agent whose conversations were recorded. The tactics of the government in obtaining Mizera's cooperation give rise to another important issue in this appeal.

The bribery scheme was discussed and recorded in a conversation between Ryan and Mizera that very evening. Mizera also met with Wilson, who had flown in from Los Angeles on May 21st for the commissioners' meeting the following day, at which time the distribution of the bribery money among the commissioners was discussed. This conversation was also recorded.

The commissioners met on May 22nd. Commissioner Ryan made the motion, and the zoning application was approved. Mizera, Wilson and Zeldin then caucused in a motel room and Mizera was given the money to distribute to the commissioners. State agents monitored this entire meeting through a transmitting device Mizera carried on his person. The following day, Mizera went to Ryan's home and gave him the bribery money, which Ryan accepted. Immediately thereafter, state agents, who had been hiding in the trunk of Mizera's car, arrested Ryan.

I.

The first count of the indictment charged all appellants with conspiring to violate the Travel Act, 18 U.S.C. § 1952,[1] the second with violating the Travel Act and aiding and abetting therein, pursuant to 18 U.S.C. § 2.[2] In a case where jurisdiction depends upon the interstate nature of the criminal activity, as with section 1952, section 2 considerably eases the prosecutor's burden. Because of section 2, he does not have to show the interstate nature of each defendant's activity, but rather that the scheme as a whole had substantial interstate connections. If it did, he must then prove that each defendant aided or abetted the scheme to make out his violation of section 1952 against each defendant. It is for this reason that, in deciding the jurisdictional question, our primary focus is upon the scheme as a whole.

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[1] 18 U.S.C. § 1952 states:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the Laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

[2] 18 U.S.C. § 2 states:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Appellants urge that the offenses committed here were matters of local concern; that there was no connection between the interstate travel and usage of interstate facilities and what they characterize as an "isolated local offense." Appellants argue that *Rewis v. United States,* 401 U.S. 808 (1971), is dispositive of the question of jurisdiction and mandates a finding that the acts committed in this case do not come within the ambit of section 1952. In that case, petitioners conducted an illegal lottery in Florida, just south of the Georgia-Florida state line. Although there was no evidence that petitioners themselves crossed state lines in connection with the lottery, several of the patrons of the lottery did so. On these facts, the Court held section 1952 inapplicable.

We do not find that *Rewis* supports appellants' position. We note specifically that the Court in *Rewis* cited with approval three lower court cases in which the organizers of an illegal scheme either traveled in interstate commerce or caused other organizers—as opposed to patrons—to do so.[3] These cases, Justice Marshall said, "correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity." 401 U.S. at 813. We find the facts of these cases, all involving illegal gambling operations, much closer to our case than those of *Rewis,* since we are confronted with no parties comparable to the patrons of *Rewis.*

This court reads the statute as broadly as *Rewis* will permit. In *United States v. Roselli,* 432 F.2d 879, 890-91 (9th Cir. 1970), a pre-*Rewis* case, we took a broad view of the act, rejecting a wide variety of challenges to its applicability which would have narrowed the act considerably. This broad construction was cited with approval in *United States v. Colacurcio,* 499 F.2d 1401, 1405-06 (9th Cir. 1974), a case decided well after *Rewis.*

Applying this general framework to appellants' case, we have no difficulty in concluding that this scheme comes well within the ambit of the statute. Mizera and Zeldin traveled in interstate commerce to discuss the rezoning with Wilson in California.

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[3]United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964), *cert. denied,* 381 U.S. 915 (1965).

Wilson gave Zeldin $10,000 to transport from California to Nevada. Wilson traveled from California to Nevada to attend the county commissioners' hearing. Zeldin took part in at least two interstate telephone conversations with Mizera.[4]

II.

Evidence obtained by electronic surveillance and wiretapping in the investigation of this case can be divided into three types. First, state agents obtained evidence through wiretaps on the phone of Broadbent, the county commissioner who served as a government informant, as well as a "body tap" placed on Broadbent. A court order pursuant to state statute was obtained for the telephone tap but not the body tap. No party disputes that Broadbent's consent was obtained for both forms of electronic surveillance. Second, a wiretap order was issued pursuant to the same Nevada statute on May 4, 1972, permitting state agents to wire Mizera's residence and office, and to tap telephones in those places. Many conversations were recorded under this order between May 5th and May 19th, but only those involving Broadbent were offered at trial. Third, on May 19, 1972, Mizera agreed to cooperate with government authorities and also agreed to allow his conversations, both telephone and personal, to be taped.

As to the first type of wiretap evidence, the law in this circuit is clear that one party's consent is sufficient justification for electronic surveillance and no prior judicial authorization is required. *Holmes v. Burr,* 486 F.2d 55 (9th Cir. 1973). Since no party disputes that Broadbent's consent was freely given, any evidence derived from the wiretap is free from challenge.

As to the second type, we note that none of these tapes (except those which also involved Broadbent) were introduced at trial. Pursuant to the command of *Alderman v. United States,* 394

[4]Appellants Zeldin and Ryan also argue that the Travel Act is unconstitutional as impermissibly vague or an infringement of the powers reserved to the states in the tenth amendment. Contentions of this nature have been consistently rejected both by this court and other circuits. United States v. Cozetti, 441 F.2d 344, 348 (9th Cir. 1971); United States v. Nichols, 421 F.2d 570, 574 (8th Cir. 1970); Turf Center, Inc. v. United States, 325 F.2d 793, 795-96 (9th Cir. 1963). By contrast, appellants have cited no cases holding the statute unconstitutional and we know of none.

U.S. 165 (1969), a hearing after the trial was nonetheless held to determine "the nature and relevance to [their] conviction of any conversations which may have been overheard," *Alderman, supra,* at 186. At this hearing, the district court ruled that the government had an independent source, Broadbent, for all information obtained by the wiretap on Mizera's phones during the period between May 5th and May 19th. The court also ruled that Mizera himself became an independent source of this same evidence after May 19th, when he agreed to cooperate with the authorities and told them all that had gone on prior to that time. No appellant was able to demonstrate to the court's satisfaction that evidence used at trial, or leads to evidence used at trial, were discovered as a result of these interceptions. Therefore, the court concluded that aside from the independent sources, "the information or leads obtained [from the Mizera wiretap before May 19th] were insignificant and insubstantial." After a thorough review of the evidence presented at this hearing and the arguments of counsel on behalf of their clients, we are not "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). We therefore affirm the trial court's conclusions.

Finally, we hold admissible on the basis of one party's consent evidence obtained from taps on Mizera's telephone and person after May 19th. *Holmes v. Burr, supra.* The question of Mizera's consent is discussed in more detail in Part III, *infra.*

III.

Appellants' arguments are also directed at the manner in which the government enlisted Mizera as a government informant. They claim that their due process rights have ben violated by the government's treatment of Mizera. They would have us dismiss the indictment altogether on due process grounds, or, at the very least, exclude all evidence procured from the Mizera wiretap after May 19th.

Appellants rely particularly on Justice Rehnquist's statement in *United States v. Russell,* 411 U.S. 423, 431-32 (1973), that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction" and argue that this is precisely that type of situation. Appellants' reliance upon this passage from *Russell* has two distinct bases.

Russell was directed specifically toward a consideration of the nature of the entrapment defense. Appellants faintly argue that Mizera forced them to commit criminal acts they would not otherwise have committed. This, of course, would be entrapment under the *Russell* standard. They argue more strenuously, however, that *Russell* considered entrapment from another perspective—the so-called "objective approach," where the focus is not on the "propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.'" *Russell, supra* at 441 (Stewart, J., dissenting). While the Court's opinion in *Russell* very clearly excludes use of the "objective approach" in most entrapment cases, the above-quoted passage of Justice Rehnquist for the Court does indicate that this approach may in certain limited instances be appropriate.

In examining the circumstances surrounding the government's confrontation with Mizera, in which he agreed to cooperate with government authorities, and Mizera's activities thereafter, we conclude that, measured against the *Russell* standard, the government's conduct did not rise to the level of a violation of appellants' due process rights. Government agents first read to Mizera the Nevada bribery statute, the "unlawful activity" which served as the predicate for the section 1952 indictment, and then recited some of the evidence they had amassed against him. Thereafter, it is undisputed that this "conversation" included the following factors:

1. Repeated assertions to Mizera that he *would* go to jail for 10 years if he refused to cooperate (10 years was the maximum sentence; the statute allows for 1-10 years imprisonment and no defendant was ultimately given the maximum).

2. Admonitions to Mizera not to get an attorney or his "usefulness" to state agents would be over.

3. Prophecies that his health would suffer irreparably if he went to jail.

4. Assurances that his friends, Wilson and Zeldin, would be kept "out of it."

5. Reminders that if he did not help obtain sufficient evidence against Ryan, he himself would be indicted.

This court does not condone the tactics used to gain Mizera's co-operation. We explicitly disagree with the lower court, which characterized the government's efforts as "excellent professional police work." On the basis of the applicable legal standards derived from *Russell,* however, we find that this treatment of Mizera does not violate appellants' due process rights. This court has emphasized that the due process channel which *Russell* kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice. *United States v. Lue,* 498 F.2d 531, 534 (9th Cir. 1974). The government's conduct, while not exemplary, does not rise to this level. *See Hampton v. United States,* 44 U.S. L.W. 4542, 4543-44 (April 27, 1976).

Nor does the government's treatment of Mizera and his acts as a government agent constitute entrapment in the "subjective," *Russell* sense. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play" *Russell* teaches, 411 U.S. at 436.[5] Here, the government enlisted Mizera's co-operation when the conspiracy was in a very advanced stage, just prior to its culmination on May 22nd. The conspiracy had been ongoing since at least January of that year.

Moreover, there is no evidence that Mizera's course of conduct changed in any sense after his enlistment on May 19th or that he influenced any of the appellants to change their course of conduct after he became a government agent. He continued to

[5]For this reason we reject Wilson's contention that the trial court's refusal to give entrapment instructions relating to Broadbent's contact with Wilson was reversible error. There is no indication that Wilson posed any objection to the trial court's refusal to give his proposed instructions and normally a failure to object will preclude appellate review. Fed. R. Crim. P. 30; 5A *Moore's Federal Practice* ¶ 51.04. Even if he had posed a timely objection, however, his proposed instructions would have presented to the jury statements of the law based upon an "objective standard" and therefore at odds with *Russell's* clear holding. They were thus properly rejected.

meet and discuss the bribery plan with Ryan. Wilson had previously made a commitment to come to Las Vegas on May 21st, and, as planned, Mizera met with him then, at which time the distribution of the bribery money was discussed. Zeldin was also present at this meeting, as planned. The argument that Mizera emplanted a criminal intent in unwilling participants at this late stage is transparently implausible.

Likewise we are unpersuaded by appellants' argument that Mizera's decision to cooperate was coerced. Whether consent was voluntary or coerced is essentially a question of fact. *United States v. Page,* 302 F.2d 81 (9th Cir. 1962). When presented with the problem, the District Court Judge wrote a thirteen page memorandum in which he dealt exclusively with the Mizera question. In resolving that issue as hed did he pointed out that he not only had the testimony of Mizera clearly in mind but that he also had considered the two tape recordings of the meeting between Mizera and the agents when Mizera agreed to cooperate. The trial judge commented on those conversations at some length,[6] coming to the conclusion that Mizera voluntarily

[6]"When representatives of the Nevada Attorney General first approached Mizera on the morning of May 19, 1972, they told Mizera that they were there to ask for his cooperation, outlined their knowledge of his involvement in an ongoing criminal project of bribing County Commissioners, let Mizera read NRS § 197.020 (offering a bribe to a public official is a felony), assured Mizera that offering a 'campaign contribution' which is clearly conditioned upon a favorable vote on a zoning matter falls within that statute, indicated that they were more interested in discovering Commissioners who would accept bribes, stated that they were fully prepared to arrest Mizera at that point and that they had enough evidence to convict him and send him to prison for ten years, but offered Mizera the alternative of cooperation, in which event he could avoid prosecution, the penitentiary, and loss of his real estate broker's license. When Mizera asked if he might call an attorney, state officers responded that, because they feared that an attorney might notify the Commissioners of the investigation, and that because some attorneys might thereby compromise Mizera's position, they did not want him to contact an attorney. They quickly added that they were not saying he could not call an attorney, but were saying only that if he did, any offer of a deal was over. (It might be added parenthetically that testimony at the trial has indicated that intimations of the investigation were in fact given to some of the Commissioners by a local attorney, and that the agents' fears were not totally unfounded.) The agents

consented to cooperate.[7]

Requiring a defendant to face up to the real world in order to obtain his cooperation or to obtain admissions of guilt or a plea of guilty is permissible under our system. In *Brady v. United States*, 397 U.S. 742, 750, the Court said:

> "The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For

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outlined some of the disadvantages of an arrest and conviction, noting that Mizera would face ten years in prison, that it would have an impact on his family, that he would lose his license and his income derived therefrom, and stated that he would be unable to go back to New York for a specialist's treatment of his headaches. The agents were candid about Mizera's position, stating that, in view of the alternatives, he was not in a position to bargain if he was to receive immunity. Once assured that he would be provided with protection from possible threats to his life because of his cooperation, Mizera agreed to cooperate. Mizera's decision was made in a matter of minutes from the time he was confronted. The tapes reflect the fact that the agents were direct but not vociferously overbearing.

. . . .

". . . Mizera also testified that he was not fearful of a prison term, but he *subjectively* concluded that he would not get the medical care he felt he needed in prison. He stated that the agents never said that medicine would not be provided him if he refused to cooperate. Mizera, under cross-examination, indicated that he clearly understood the agents to say that, while he could call an attorney if he wished, it would mean that no deal would be offered him. While he stated he consented to cooperate with reluctance, Mizera nevertheless testified that he agreed to cooperate and went with the agents voluntarily.

"Finally, although the tape recordings made during the meetings of that day show that Mizera had occasional reluctant afterthoughts about cooperating, the major portions of the recordings reveal Mizera freely volunteering suggestions on how to proceed with the investigation."

[7]"Considering the circumstances as a whole, the tone, approach and statements of the agents, the rapidity with which Mizera consented, the active and willing cooperation Mizera demonstrated immediately after agreeing to assist the investigation, and Mizera's own testimony that he cooperated and voluntarily began that cooperation, this Court finds that Mizera's initial consent was 'voluntary' and valid."

> others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction."

See also Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *Tollett v. Henderson,* 411 U.S. 258 (1973).

While we would have preferred that the government had shown more restraint after confronting Mizera with the evidence against him, we cannot say that the judgment of the trial court was clearly erroneous. We, therefore, hold that all wiretap and electronic surveillance evidence derived from Mizera's conversations after May 19 was properly admitted on the basis of one party's consent. *Holmes v. Burr,* 486 F.2d 55 (9th Cir. 1973).

Appellants Zeldin and Wilson raise an independent due process argument regarding the contact between Broadbent, who, it will be recalled, was also a government informant, and Morris, Wilson's retained attorney. It is undisputed that Broadbent approached Morris through an intermediary on April 27, 1972, and told Morris that he was being led into a trap, after which Morris withdrew from representing Wilson. Beyond this, however, the circumstances surrounding this contact are shrouded in mystery.

It is not clear, for example, on what basis Zeldin claims his due process rights were violated by Broadbent's contact. Morris testified at trial that he never met Zeldin prior to April 27, 1972. Zeldin claims at one point that he had agreed to enter into a partnership with Wilson, while at another point he states he *was* in partnership with Wilson at the time of this alleged interference. Nor do we know the terms of the Morris-Wilson retainer agreement—whether Wilson retained Morris for the alleged Wilson-Zeldin partnership, individually, or on some other basis.

In any event, all the evidence indicates that Broadbent was acting independently and out of concern for a long-time friend in urging Morris to remove himself from the case. There is absolutely no evidence that Broadbent consulted with state agents before approaching Morris or that the state was in any manner involved in this contract. While we do not hold that the government can always fall back on conventional agency principles to disclaim responsibility for acts committed by its informants, we do hold that on these unique facts no due process violation in the *Russell* sense transpired.

IV.

Appellant Ryan contends that the evidence was insufficient to support the verdict against him as a coconspirator. He argues that his participation in the conspiracy can only be proved by acts committed prior to May 19, 1972, the date Mizera became a state agent, on the theory that a person cannot conspire with himself and one who is acting as a government agent is incapable of being a member of a criminal conspiracy. Accepting, *arguendo*, the appropriateness of this principle in this case, we find the evidence more than sufficient to support the verdict.

Ryan met with Mizera on numerous occasions to discuss the rezoning. At the second of these meetings, in February of 1972, campaign contributions in exchange for a favorable vote were mentioned. Ryan did not repudiate the scheme at that time, as Broadbent had done upon first becoming aware of it. Rather, he continued to meet with Mizera concerning this rezoning. While the bribe was not specifically discussed in the March meeting, it is difficult to imagine that Ryan assumed that Mizera had dropped his original proposal. In April of 1972, Ryan did repudiate the plan altogether because his share of the "kitty" had been reduced, but resumed his role in the scheme shortly thereafter, when Mizera told him that he would receive $3,000 rather than the $2,000 originally promised. Finally, on May 17, 1972, Ryan told Mizera that he would make the necessary motion at the commission meeting.

In analyzing Ryan's role in the conspiracy, it is important to keep in mind that Mizera had been rebuffed by all the other commissioners (except, of course, Broadbent, who was serving as an informant). Thus, without Ryan's cooperation with Mizera

up to May 17th, the conspiracy almost certainly would have dissolved.

This court has repeatedly held that once a conspiracy is established, as it was here abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States v. Turner,* 528 F.2d 143, 162 (9th Cir. 1975); *United States v. Westover,* 511 F.2d 1154, 1157 (9th Cir. 1975). At the same time, we have said that mere knowledge of the existence of a conspiracy or mere association with a conspirator is insufficient to sustain a conviction. *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974). The government must show that a defendant had a "stake in the venture." *United States v. Cianchetti,* 315 F.2d 584, 588 (2d Cir. 1963). We find the evidence linking Ryan to this conspiracy considerably more than "slight" and clearly indicating a stake in the illegal venture.

Accordingly, for the reasons set forth herein, the judgment of the district court is

Affirmed.

A request for en banc consideration having been made by an active member of the court, and the matter submitted to all of the active judges, the request was rejected by a majority thereof. An order was thereupon entered denying en banc consideration. Judge Hufstedler files the following dissent from that order, in which Judge Ely joins.

HUFSTEDLER, Circuit Judge, dissenting from denial of en banc hearing with whom Judge Ely joins:

The issue is whether Mizera's consent was voluntary. If Mizera's consent was involuntary, the conversations between him and Ryan were inadmissible under 18 U.S.C. § 2511(2)(c).[1]

The district court's factual findings on this issue can be summarized as follows:[2] To secure Mizera's consent, the officers told

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[1] *E.g., see* Holmes v. Burr (9th Cir. 1973) 486 F.2d 55; United States v. Franks (6th Cir. 1975) 511 F.2d 25; United States v. Bragan (4th Cir. 1974) 499 F.2d 1376.

[2] The district court's factual findings are, of course, subject to the clearly erroneous standard of review. However, the district court's ultimate conclusion that the consent was voluntary rests on a legal deter-

him that they were prepared to arrest him immediately and that they had enough evidence to send him to prison for ten years. But, they suggested, if Mizera "cooperated," the prosecution would be dropped. The officers also told him that if he did not cooperate, he would lose his livelihood, damage his family, and be deprived of special medical treatments for his severe headaches. Mizera asked if he could call his lawyer. The officers said that he could do so, but if he did, the deal was off. The district court held that "consent" thus secured was "voluntary," the panel affirmed, and the court has refused to take this case en banc.

As early as 1897, the Supreme Court recognized that coercion need not take the form of physical torture:

> " 'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' " (*Bram v. United States,* 168 U.S. 532, 542-43.)

And more recently:

> ". . . [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228.)

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mination of the sufficiency of the evidence to support the conclusion. The standard of appellate review of this determination is the same as that applied in reviewing the sufficiency of evidence to sustain a conviction. (*E.g.,* Channel v. United States (9th Cir. 1960) 285 F.2d 217, 220.)

Under either formulation of the standard of appellate review, the district court's conclusion of voluntariness is unsupported and is reversible error.

The psychological pressures employed by the officers in the present case represent just such coercion comprised of threats of prosecution and long imprisonment, of the inability to receive vital medical treatment, of unauthorized promises of immunity, and of the deprivation of counsel. The methods were not as clumsy as physical torture, but they were no more subtle and every bit as effective.

The conclusion of the district court, affirmed by the panel, that this conduct was not coercive, and that the consent produced by these pressures was voluntary, is flatly contrary to the controlling teachings of the Supreme Court and to the law of our Circuit. (*E.g., Lynum v. Illinois* (1963) 372 U.S. 528 (Confession secured by threats that defendant "'could get 10 years and [that] the children could be taken away'" unless she "cooperated," held involuntary. (372 U.S. at 531, 534) "We think it is clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases." (372 U.S. at 534).) *Shotwell Mfg. Co. v. United States* (1963) 371 U.S. 341 (Evidence procured under promise of immunity "can no more be regarded as the product of a free act of the accused than that obtained by official physical or psychological coercion." (371 U.S. at 347-48).) *Rogers v. Richmond* (1961) 365 U.S. 534 (Uncounseled confession of defendant who was threatened that his wife would be brought in for questioning was involuntary.) *See also, United States v. Huss* (2d Cir. 1973) 482 F.2d 38; *United States v. Laughlin* (D. D.C. 1963) 222 F. Supp. 264; and *McGarrity v. Wilson* (9th Cir. 1966) 368 F.2d 677, 679 ("Incriminating statements or a confession extorted by mental coercion are as involuntary as if they were obtained by violence or threats of violence.").)[3]

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[3]" 'The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.'" (Bram v. United States (1897) 168 U.S. at 547.)

As Judge Duniway pointed out in *United States v. Rothman* (9th Cir. 1973) 492 F.2d 1260, 1263: "Where the consent [to a search] is obtained through a misrepresentation by the government, Bumper v. North Carolina, *supra*, 391 U.S. 543 . . . , or under inherently coercive pressure and the color of the badge, Johnson v. United States, *supra*, 333 U.S. 10; United States v. Marshall, 9 Cir. 1973, 488 F.2d 1169, 1188-1189, such consent is not voluntary." Moreover, coercion is implied when consent is obtained "under color of the badge," and the Government must show that there was no coercion in fact. (*United States v. Irion* (9th Cir. 1973) 482 F.2d 1240, 1244; *United States v. Page* (9th Cir. 1962) 302 F.2d 81, 84.)

The district court attempted to justify its conclusion that Mizera's consent was voluntary by suggesting that "voluntariness" takes on a different meaning in the context of coerced confessions than it does in the context of consent to participation in monitoring or other activities protected by the Fourth Amendment. (Although the district court found that the threatened denial of medical treatment was not coercive in the present case, it said that it would have "great concern" if the case involved a confession or "the waiver of a right associated with a fair trial.") This distinction is unfounded. Coercion does not evaporate with an assumed change in climate between the Fourth and Fifth Amendments. Nor does coercion become free choice when it is applied to obtain consent rather than to force a confession. (*United States v. Rothman, supra,* 492 F.2d 1260.)

The panel's effort to justify its conclusion is similarly unsuccessful. The panel postulates that the officers' threats did not induce Mizera's consent; rather, Mizera brought his plight upon himself. The officers, the panel says, simply required the defendant "to face up to the real world in order to obtain his cooperation;" that pressure is entirely appropriate, it adds, on analogy to pleas of guilty, quoting *Brady v. United States* (1969) 397 U.S. 742, 750.

The panel's assumption that Mizera was guilty of a crime is unsupported by the record. Mizera has not been convicted of any crime, except by the rhetoric of the officers and the speculations of the panel. The Constitution does not give law enforcement personnel the right to decide guilt or innocence, nor does

it give courts the power to make that determination with neither a guilty plea nor a trial. But even if Mizera had been guilty of the crime for which the officers threatened prosecution and conviction, his guilt would be irrelevant in deciding the coercion issue.[4] Coercion is not acceptable whether it is applied to persons who are ultimately found guilty or to those who are ultimately found innocent. Coercion is forbidden both because it is unacceptable police conduct in our justice system and because it tends to produce involuntary words and deeds. We should be ever mindful that "if we reflect carefully, it becomes abundantly clear that we can never acquiesce in a principle that condones lawlessness by law enforcers in the name of a just end." (*United States v. Huss* (2d Cir. 1973) 482 F.2d 38, 52.)

No analogy exists between the taking of a guilty plea by a court and the extraction of "cooperation" or a confession by law enforcement officers, without the presence of any judicial officer and without the presence of counsel. As Mr. Justice White said in *Brady:* "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." (397 U.S. at 748.) "Since *Gideon v. Wainwright,* 372 U.S. 335 (1963), it has been clear that a guilty plea to a felony charge without counsel and without a waiver of counsel is invalid. [Citations omitted.]" (397 U.S. at 748-49, n.6.)

The officers effectively prevented Mizera from consulting counsel after he asked to do so. That deprivation cannot be brushed

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[4]The panel relies on Holmes v. Burr, *supra,* where there was no question of coercion. It also uses United States v. Lue (9th Cir. 1974) 498 F.2d 531, and Hampton v. United States (1976) ___ U.S. ___ [44 U.S.L.W. 4542] which are entrapment cases, holding that certain law enforcement techniques that take advantage of a subject's "predisposition" are not violative of due process. Here, the fact that extreme pressure had to be used to induce cooperation belies any notion that Mizera was predisposed to cooperate.

aside. His need for counsel was evident.[5] Counsel would surely have revealed to him that the officers' "compelling" statements were deceitful. The officers told Mizera that he would serve ten years, if convicted, knowing full well that ten years was the maximum penalty for Mizera's alleged misdeed. The officers also assured Mizera of conviction, although they had to know that conviction is not a certitude. Even worse, the officers offered to drop any charges against Mizera when they had no legal power to promise immunity. Consent obtained by governmental misrepresentation is involuntary. (*United States v. Rothman, supra,* 492 F.2d at 1263; *see Fuller v. United States* (D.C. Cir. 1967) 407 F.2d 1199, 1213 ("Of course garnering a confession by artifice is no more permissible than achieving the same result by some cruder coercion.").)

I would en banc this case to eradicate the intra-circuit conflict between *Ryan* and *United States v. Rothman, supra,* 492 F.2d 1260, and its antecedents, and to bring *Ryan* in line with controlling Supreme Court authority. On the merits, I would reverse and remand *Ryan* for a new trial free from the tainted evidence.[6]

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[5]As Mr. Justice Sutherland observed in Powell v. Alabama (1932) 287 U.S. 45:

> ". . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He requires the guiding hand of counsel at every step in the proceedings against him." (*Id.* at p. 69.)

[6]It is noteworthy that the Government's respect for Mizera's constitutional rights has been deficient in more than one instance. The panel observes that Mizera's office and residence were "bugged" prior to his grant of consent on May 19, 1972. Nevertheless, because the evidence culled from this source was said to be available from independent sources, the panel rules that its admission did not constitute error. (United States v. Ryan, No. 75-1317, at p. 8 (slip op'n, May 24, 1976).)

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TITLE 18 U.S.C.A.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for each misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor

on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who —

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when —

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not uti-

lize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other

authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of —

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or

injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense

as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of —

[*See main volume for text of (a) and (b)*]

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of crimi-

nal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

[*See main volume for text of (1)(ω) to (g); (2)*]

As amended Pub.L. 91-452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91-644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.

TITLE 18 U.S.C.A. FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission there-

from unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 51. Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

TITLE 28 U.S.C.A. FEDERAL RULES OF CIVIL PROCEDURE

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court

is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

NEVADA REVISED STATUTES

Now, 197.020 reads in part — the title is "Bribery of Public Officers" — (reading)

> "Every person who shall give, offer or promise directly or indirectly any compensation, gratuity or reward to a person executing any of the functions of a public officer with the intent to influence him with respect to any act, decision or vote or other proceedings in the exercise of his powers or functions shall be guilty of an offense against the laws of the State of Nevada."

Now, 197.030, which has as its title "Asking or Receiving Bribes by Executive Board or Administrative Offi-

cers" — and a County Commissioner is such an executive or administrative officer: (reading)

> "Every executive or administrative officer or person elected or appointed to an executive or administrative office, who shall ask or receive directly or indirectly any compensation, gratuity or reward, or any promise thereof, upon agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced thereby, shall be guilty of an offense against the laws of the State of Nevada."

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Ernest J. Cook , being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 1706 S. Maple Avenue, Los Angeles, California, 90015.

That on December 29, 1976, affiant served copies of the within

Petition for a Writ for Certiorari to the United States Court of Appeals for the Ninth Circuit upon persons named below:

By courier service;

United States Supreme Court United States Supreme Court Building 1st Avenue, N.E. Washington, D.C. 20543	1 original and 39 copies
Solicitor General Department of Justice 9th and Pennsylvania Avenue, N.W. Room 5143 Washington, D.C. 20530	3 copies

By mail;

Lawrence J. Semenza United States Attorney 300 Las Vegas Boulevard, South Las Vegas, Nevada 89101	3 copies
Richard A. Wright Asst. United States Attorney 300 Las Vegas Boulevard, South Las Vegas, Nevada 89101	3 copies

That there is a regular communication by mail between the place of mailing and the place so addressed.

Ernest J. Cook

Subscribed and sworn to before me
this 28th day of December, 1976

Lawrence E. Hieger

Notary Public in and for the
State of California